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ABSTRACT

Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act (EEOA) of 1974 impose an affirmative obligation on the states to rectify the language deficiencies of non-English-speaking students but do not specify a particular remedy, leaving it to State and local educational authorities to determine which programs, methods, or techniques constitute "appropriate" action. The Bilingual Education Act of 1974, by contrast, is a categorical statute, providing financial assistance in the form of direct grants to local educational agencies for the purposes of developing elementary and secondary school programs to meet the needs of limited-English-speaking school children. Until recently, the Federal courts, faced with suits challenging the legal sufficiency of existing programs under Title VI and EEOA, tended to favor bilingual education over other kinds of compensatory language programs. In keeping with the shifting mood of the country and the shifting policies of the executive branch, the courts have recently been giving the statutory language a more literal construction and have been refusing to infer Congressional intent to favor bilingual education over other kinds of "appopriate" programs. As a result, bilingual education is now viewed as a compensatory method of instruction which a school board may choose to implement in order to fulfill its Federal obligations or a court may impose on a school board which has failed to fulfill its obligations. It is not a deemed right or entitlement. (CMG)

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THE FEDERAL LAW OF BILINGUAL EDUCATION

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SUMMARY

THE FEDERAL LAW OF BILINGUAL EDUCATION

The general purpose of this paper is to discuss and analyze the body of federal law governing bilingual education. Its specific goal is to articulate the applicable rules and standards defining the conditions and circumstances under which bilingual education as a matter of federal law is deemed an appropriate measure for enforcing the federal rights of limited English speaking school children to equal educational opportunity.

Under federal law, three major statutes affect the rights of non-English speaking school children to equal educational opportunity. These are Title VI of the Civil Rights Act of 1964, the Equal Educational Opportunity Act of 1974, and the Bilingual Education Act of 1974.

The first two, Title VI and the Equal Educational Opportunity Act, impose an affirmative obligation on the states to rectify the language deficiencies of non-English speaking students but do not specify a particular remedy, leaving it to state and local educational authorities to determine which programs, methods or techniques constitute "appropriate" action. Under Title VI, "(w)here inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to

rectify the language deficiency in order to open its instructional program to these students." Under the Equal Educational Opportunity Act of 1974, school districts have a duty to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." There is no statutorily preferred method of enforcing these rights and obligations. Congress has intervened only interstitially and in the absence of a clear directive that it intended to supplant state created norms, the states retain the power traditionally vested in them to set educational policy and curricula. The Department of Education may, as the federal agency "authorized and directed to effectuate Title VI, issue "rules, regulations, or orders of general applicability... consistent with achievement of the objectives of the statute," defining the legal responsibility of school boards to their non-English speaking students. In addition, the federal courts may, in actions challenging the sufficiency of existing programs under federal law, be asked to decide whether the action of school authorities constitutes good faith implementation of the governing principles. In the first instance, however, school authorities have the primary responsibility for elucidating, assessing and solving local school problems. Federal standards where they operate are used to test the "appropriateness" of state-created programs under federal law, and federal remedies where they exist supplant state-created norms only on showing that a school district has failed to take "appropriate" action.

In contrast, the Bilingual Education Act establishes a program of federal financial assistance to state and local educational authorities to encourage them to develop, implement and improve bilingual education programs. It is a categorical statute, providing financial assistance in the form of direct grants to local education agencies for the purposes of devising elementary and secondary school programs designed to meet the special educational needs of limited English speaking school children.

Read together, these three acts propound a federal policy promoting diversity and experimentation in educational programs designed to establish equal educational opportunity for children of limited English speaking ability. Under these acts, bilingual education is viewed as a compensatory method of instruction which a school board might choose to implement to fulfill its federal obligations, or a federal court might impose on a school board which has failed to fulfill its obligations. It is not deemed a right or entitlement. Although non-English speaking school children have a right to a "meaningful" education, there is no statutorily preferred method of enforcing this right. "Teaching English to students...who do not speak the language is one choice. Giving instruction to this group in their native language is another. There may be others." Lau. v. Nichols, 414 U.S. 563, 565-66(1974).

THE FEDERAL LAW OF BILINGUAL EDUCATION

Introduction

The general purpose of this paper is to discuss and analyze the body of federal law governing bilingual education. Its specific goal is to articulate the applicable rules and standards defining the conditions and circumstances under which bilingual education as a matter of federal law is deemed an appropriate measure for enforcing the federal rights of limited English speaking school children to equal educational opportunity.

Under Title VI of the Civil Rights Act of 1964,[1] "(w)here inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[2] Under the Equal Educational Opportunity Act of 1974,[3] school districts have a duty to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[4] There is no statutorily preferred method of enforcing these rights and obligations. Congress has intervened only "interstitially" and in the absence of a clear directive that it intended to "supplant state created norms,"[5] the states retain the power traditionally vested in them to set educational policy and curricula. The

Department of Education (DOE) may, as the federal agency "authorized and directed to effectuate" Title VI, issue "rules, regulations, or orders of general applicability . . . consistent with achievement of the objectives of the statute,"[6] defining the legal responsibility of school boards to their non-English speaking students. In addition, the federal courts may, in actions challenging the sufficiency of existing programs under federal law, be asked to decide "whether the action of school authorities constitutes good faith implementation of the governing . . . principles."[7] In the first instance, however, "school authorities have the primary responsibility for elucidating, assessing and solving [local school] problems."[8] Federal standards where they operate are used to test the "appropriateness" of state-created programs under federal law, and federal remedies where they exist supplant state-created norms only on a showing that a school district has failed to take "appropriate" action.

I. THE LEGAL FRAMEWORK

A. Constitutional Rights and Remedies

The right of limited-English speaking schoolchildren to compensatory language instruction is a statutory right. It is not a constitutional right. In Lau v. Nichols,[9] the Supreme Court case which upheld the right of non-English speaking schoolchildren to a "meaningful" education, the court never

reached the constitutional argument, relying solely on Title VI to reach its conclusion.[10] Subsequently, the lower courts have either implicitly or explicitly rejected it.[11] As Chief Judge Lewis of the Tenth Circuit wrote in Keyes v. School District No. 1,

> The clear implication of arguments in support of the court's adoption of [a bilingual-bicultural program] is that minority students are entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not.[12]

The equal protection clause of the fourteenth amendment imposes on the states a nondiscrimination obligation forbidding the disparate treatment of school children on the basis of suspect criteria.[13] Under the Constitution, the right of limited-English speaking school children to equal educational opportunity is the right not to be discriminated against on the basis of national origin. No clause of the Constitution secures to limited-English speakers the right to special programs. For purposes of equal protection analysis, they are not a suspect class,[14] and a school board's failure to provide differential treatment does not infringe on a constitutionally protected fundamental right.[15]

Limited-English speaking children may, suing as members of a constitutionally protected minority group such as Mexican Americans, be in a position to show that a school board's policies discriminate unconstitutionally on the basis of national origin and that in consequence they are entitled to relief in the

form of compensatory language instruction designed to eliminate all vestiges of discrimination root and branch.[16] "Fashioning a remedy for de jure segregation, however, is," as the Ninth Circuit has written,

> a task quite distinct from determining whether there exists a Constitutional right to bilingual-bicultural education . . . Determining that a remedy is appropriate to further the correction of de jure segregation does not a fortiori make it a constitutional entitlement in the absence of de jure segregation.[17]

Limited-English speakers are not constitutionally entitled to differential treatment merely because they receive fewer benefits from an instructional program than the English speaking majority. Where a school district has made the same education available to all on the same terms and conditions, it is not constitutionally compelled to take affirmative steps to overcome the language barriers impeding equal participation. The Equal Protection clause is violated only by conduct animated by an intent to discriminate and not by conduct which has a differential impact on persons of different races and nationalities.[18]

B. Statutory Authority

Under federal law, three major statutes affect the rights of non-English speaking school children to equal educational opportunity. These are Title VI,[19] the Equal Educational Opportunity Act (EEOA),[20] and the Bilingual Education Act of 1974.[21] The first two, Title VI and the EEOA, impose an

affirmative obligation on the states to rectify the language deficiencies of non-English speaking students but do not specify a particular remedy, leaving it to state and local educational authorities to determine which programs, methods or techniques constitute "appropriate" action. The Bilingual Education Act, in contrast, establishes a program of federal financial assistance to state and local educational authorities to encourage them to develop, implement and improve bilingual education programs. Read together, the three acts propound a federal policy promoting diversity and experimentation in educational programs designed to meet the needs of children of limited-English speaking ability.

1. Discretionary Grant Programs:

(a) The Bilingual Education Act of 1974

(1) Legislative Antecedents: The 1968 Act

Growing out of the civil rights movement of the 1960's, Title VII of the Elementary and Secondary Education Act (ESEA),[22] popularly known as the Bilingual Education Act of 1968, was the first major piece of federal legislation to address specifically the "acute" educational needs of "children of limited English speaking ability."[23] A categorical statute, the act provided financial assistance in the form of direct grants to local educational agencies for the purposes of developing and implementing "imaginative elementary and secondary school

projects" designed to meet the special educational problems of limited-English speaking children attending "schools having a high concentration of such children from families . . . with incomes below $3000 per year."[24]

The informing concept of the act was to redress the educational disadvantages of a class of national origin school children whose problems had been largely ignored or neglected.[25] Its purpose was to meet "the urgent need for comprehensive and cooperative action now on the local, state and feceral level."[26]

The act was not a general aid statute which would cover all affected school districts, nor one which would secure bilingual services to every child in need of them. The funds made available under the act were limited, ranging from $15,000,000 in 1968 to $40,000,000 in 1970,[27] and its specific goals equally narrow: to fund demonstration projects which would set an example for other school districts and stimulate further development on the state and local level.[28]

As a bilingual education act, Title VII implicitly supported the view that bilingual-bicultural instruction was the most effective method of instruction for limited and non-English speaking school children.[29] Because, however, of

> the need for extensive research, pilot projects and demonstrations, the . . . legislation [did] not intend to prescribe the types of programs or projects that [were] needed. Such matters [were] left to the discretions or judgments of the local school districts to encourage both varied approaches to the problem and also special solutions for a particular problem of a given school. The legislation enumerated types of programs as being illustrative of possible solutions.[30]

The states were free and encouraged to experiment.

Despite its narrow goals, the act was an important milestone. It represented not only the first major piece of federal legislation to define the educational problems of limited-English speaking school children as a matter of national policy, but also the first expression of Congressional support for a specifically bilingual-bicultural approach to these problems. In addition, by injecting a federal presence into an area of activity traditionally reserved to the states, it raised for the first time the issue of the appropriate federal role in developing and implementing educational policies and programs for limited-English speaking children. In recent years, this issue has been central to the debate over bilingual education.[31]

(2) The Bilingual Education Act of 1974

By the summer of 1972, it had become apparent that unless the Congess acted promptly to extend the Bilingual Act of 1968, it would expire at the end of the 1973 fiscal year.[32] At the same time, it was also clear that considerable political pressure from the Hispanic community was being brought to bear on members of Congress not merely to extend the act, as the Administration was requesting, but to expand and update it.[33] Reacting to these strictures and pressures, Congress after lengthy debate and deliberation, passed in the summer of 1974, the Bilingual Education Act of 1974.[34]

Strictly speaking, the Bilingual Education Act of 1974 amended the earlier act, and the 1974 amendments, insofar as they built on existing federal law and practice in the area of bilingual education, can be viewed simply as statutory reforms. In fact, the later act completely superceded the earlier, substituting an entirely new text, and reflected a substantial shift in federal policies and purposes.

In a recent Ninth Circuit case involving the right of limited English speaking children to equal educational opportunity under the EEOA,[35] the Court of Appeals took the occasion to discuss the Bilingual Education Act of 1974 as it bore on the issue whether Congress intended when it enacted the EEOA to require educational authorities to adopt a particular type of remedial language program. In reaching the conclusion it had not, the Court wrote:

> At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, . . . The Bilingual Education Act established a program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. The Bilingual Education Act implicitly recognized that bilingual education programs were still in experimental stages and that a variety of programs and techniques would have to be tried before it could be determined which were most efficacious. Thus, although the Act empowered the U.S. Office of Education to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own.[36]

As it stands, this statement is a more accurate description of the 1968 act than its successor. Although the Fifth Circuit

is technically correct in saying that Congress did not under the 1974 act prescribe specific programs, it ignores the fact that the amended act establishes statutory definitions of bilingual education and bilingual education programs which narrow the range of options available to state and local authorities. Under the 1968 act, a statutorily sufficient program or activity was one which simply "[met] the purposes of this title."[37] Under the 1974 act, a bilingual education program is one "in which there is instruction in both the native language of [limited-English speaking] children and in English, given with appreciation of the cultural heritage of such children and in which, with respect to elementary schools, such instruction is to the maximum extent feasible to be in all courses which are required of the child pursuant to state law."[38] Under the 1968 act, an acceptable, i.e. fundable, program was one which addressed the special needs of limited-English speaking children;[39] under the 1974 Act, as a matter of law, the educational needs of these children "can be met by the use of bilingual education methods and techniques."[40]

The 1968 act in several places stressed that its purpose was to encourage local school districts to develop demonstration and pilot projects designed to meet the needs of limited-English speaking school children;[41] the amended act mentions demonstration projects only once, and then only as they constitute "effective ways of providing for [these] children . . . instruction designed to enable them, while using their native language, to achieve competence in the English language."[42] The 1968 Act provided that "[g]rants under this title may be used

. . . for . . . the establishment, maintenance, and operation of programs, . . . designed to meet the special educational needs of children of limited-English speaking ability . . . through activities such as . . . bilingual education programs; . . ."[43] The later act provides that "[f]unds available for grants under this part shall be used for . . . the establishment, operation and improvement of programs of bilingual education: . . ."[44] Like its predecessor, the 1974 Act declares it a matter of policy of the United States to "encourage the establishment and operation . . . of educational programs using bilingual educational practices, techniques and methods" only "where appropriate;"[45] in contrast to the earlier act, however, it makes no provision for actually funding a program which does not "use bilingual educational practices, techniques and methods."[46] At almost every point, in short, the 1974 act demonstrates that Congress not only intended to promote statutorily defined bilingual education programs at the expense of other remedial language programs but also viewed all other methods as inadequate.[47]

In advancing this view, the 1974 act demonstrates a dramatic shift in legislative purpose. Whereas the earlier act was premised on the "urgent" need to address the educational problems of limited-English speaking school children, the later act was promulgated for the purpose of "establish(ing) equal educational opportunity."[48] A number of factors contributed to this development, notably the report of the U.S. Commission on Civil Rights which in 1972 published findings that "the public schools

in the Southwest are not providing equal educational opportunity for Chicano children."[49] The most significant factor, however, was the Supreme Court's decision in Lau v. Nichols[50] which established the right of language minorities to equal educational opportunity under Title VI of the Civil Rights Act. This decision came down in the middle of the Congressional debates over Title VII and created a favorable climate for the proposed legislation. Speaking on the floor of the Senate the day after Lau was decided, Senator Kennedy, one of the chief sponsors of the 1974 Act, made the following statement:

> [Lau] for the first time states unequivocally the right under the Civil Rights Act of 1964 for non-English-speaking students to receive special educational instruction to meet their language deficiencies . . . .
>
> Although the Court did not recommend a specific remedy to the language deficiency of the non-English-speaking students, it is clear that bilingual education will in most cases provide the fullest educational opportunity for those children.[51]

In establishing a nexus between bilingual education and the principle of equal educational opportunity, the Bilingual Education Act of 1974 implicitly supported the proposition that a school board which implements a Title VII bilingual education program has fulfilled its Title VI obligations to language minority school children. It does not follow from this, however, that in the absence of bad faith, a school board's failure to provide bilingual education violates the right to equal educational opportunity. As Lau left open the questions of

remedies and the appropriate federal role,[52] so the amended act did not put the full weight of the federal government behind its policies. Though in deference to Lau and their shared principle of equal educational opportunity, it dropped the requirement that family income act as a determining factor in awarding grants,[53] it did not require school boards to implement programs in bilingual education.[54] Furthermore, it did not adequately fund the programs but authorized a level of funding over five years which could meet the educational needs of only a fraction of the estimated five million children who according to the Senate Report stood in need of bilingual services.[55]

Viewed in this light, the relationship between Lau and Title VII is essentially a complementary one, not a reinforcing one. Read together, they do not require more than one standing alone would require. As Congressman Railsback of Illinois remarked during the House debates on Title VII,

> [Recently,] the Supreme Court held [in Lau v. Nichols] that Federal civil rights laws require San Francisco public schools to take steps to insure that the nearly 3,000 non-English-speaking children are equipped with language skills to profit from their required attendance in school . . .
>
> Fortunately, there is also a commitment on the part of Congress to implement bilingual education programs in the national schools.[56]

(3) The 1978 Amendments and Beyond

Subsequent to its passage, the Bilingual Education Act of 1974 was amended in 1978[57] to extend its coverage five years and

to refine the statutory definitions of bilingual education and bilingual education programs.

The 1978 amendments do not change the character of the Act. Although the Senate Report noted that "effective bilingual education programs ought to be implemented to benefit all children in need of such services throughout the nation,"[58] the revised statute does not authorize a level of spending sufficient for that purpose but urges instead increased state and local funding of bilingual education.[59] At the same time, although the 1978 amendments call on the Secretary of HEW to develop a plan to convert the bilingual education program "from a discretionary grant program to a formula grant program," they do not actually authorize conversion but request the Secretary to recommend whether conversion should take place.[60] Following the Act's expiration, Congress will then decide on the basis of departmental studies evaluating the effectiveness of existing programs and the costs of extending them to all limited-English speaking children in need of bilingual services, whether to convert to an entitlement program, whether simply to extend present coverage for a period of time, or whether to let the Act lapse.

At this writing, it is difficult to project how Congress will decide these issues. For a number of reasons, the DOE is likely to take positions against both extension and conversion and whether Congress will, in the teeth of Administrative resistance, press the issue is questionable. As a matter of principle, the present Administration is opposed to programs of

federal financial assistance to state and local authorities which condition the terms of acceptance; and where as here federal funds are used to develop educational programs and policies which it does not support, the DOE is likely in a period of economic retrenchment to seek, at the very least, a substantially reduced federal level of commitment.[61]

Present administrative policies favor block grants which permit state and local authorities to determine for themselves not only how they should address the language problems of limited-English speaking school children but also, more generally, how they should allocate resources and establish priorities at a time when budgetary constraints are forcing them to cut back on basic services and programs. In consequence, the issue of allocating limited resources will unquestionably figure prominently in the debates over the Act; and in assessing the cost effectiveness of bilingual education programs, Congress may find it necessary to redefine the federal role in securing equal educational opportunity for limited-English speaking children.

During the debates over the Bilingual Education Act of 1968, the U.S. Commissioner of Education, Harold Howe II, in a statement before the House Subcommittee on Education, voiced administrative objections to a categorical act authorizing funds specifically for the purpose of developing bilingual education programs.[62] There already existed, he argued, a sufficient basis under Title I of the ESEA, for making funds available to schools for programs designed to meet the needs of limited-English speaking school children. In 1968, Congress rejected this

argument on grounds that Title I, the largest of the federally supported special assistance education programs, had allocated less than 1% of its budget for bilingual programs.[63] In 1984, given the increased level of federal, state and local support for bilingual education, Congress may be more receptive to the idea of consolidating Title VII under an omnibus appropriations act such as Title I, which is designed to promote equal educational opportunity for all "educationally deprived children in low income areas."[64] Such a move would not only rationalize the present structure but also if properly implemented promote the development of compensatory educational programs encouraging a multi-pronged approach to the problems of educating limited-English speaking children.

At it presently stands, the Bilingual Education Act focuses on a single educational need, and to the extent it addresses the educational problems of a depressed, disadvantaged and alienated segment of our population exclusively in terms of their language deficiencies, it is likely to fail in its purposes and disappoint expectations.[65] Studies evaluating the effectiveness of bilingual education are inconclusive. Both sides can point to programs and studies which support their view; neither can conclusively establish the success or failure of a program in terms of the program itself.[66] Success and failure are often owing to factors either incidental to the program or beyond its control. Success is more a function of class size and teaching quality than of program content. "Bilingual Education has its roots in individualized instruction,"[67] and a bilingual program

(or any remedial language program for that matter) which actually provides individualized instruction is likely to succeed. On the other side, failure is largely owing to problems anterior to English-speaking ability. As Joshua Fishman has observed, compensatory bilingual education is for the most part directed towards "populations that would present almost insuperable problems to our schools and to all our establishment institutions, even if they were monolingual."[68] In consequence, "[it] is too frail a device, in and of itself to significantly alter their learning experience, . . . or their . . . learning success."[69] "It is of course true," he continues, "that foisting a language other than their own upon such children is equivalent to imposing an extra burden upon those least capable of carrying it."[70] He makes the point, however, that

> precisely because there are so many other pervasive reasons why such children achieve poorly, . . . removing this extra burden . . . -- and leaving all else as it was -- does not usually do the trick, particularly when the teachers, curricula, and materials for bilingual education are as nonoptimal as they currently usually are . . . . Just as there is not a simple school-based solution to the learning problems of the alienated-in-general, we cannot and should not expect bilingual education to provide such a solution for the non-English-mother-tongue-alienated-poor in particular . . . . Who among us would care to defend the contribution of (or the prospects for) science education or social studies education on the basis of its effectiveness with alienated and dislocated populations such as those receiving compensatory bilingual education.[71]

Fishman's analysis is persuasive and Congress should, when the time comes to debate the issue, asses Title VII's achievements not only in terms of its stated goals and purposes

but also in terms of its capabilities. "Like much else that is promising in American education," Fishman points out, "bilingual education suffers from four serious lacks: a lack of funds (Title VII has been pitifully starved), a lack of trained personnel, a lack of evaluated experience (with respect to curricula, materials and methods) and a lack of sociohistorical perspective."[72] Moreover, he adds, "it is not and cannot be a cure-all for the myriad disadvantages faced by the millions of poor-non-English- mother-tongue children in our society."[73]

Bilingual education may well be the single most effective method of rectifying the language deficiencies of limited-English speaking children. The purpose of Title VII, however, is to establish equal educational opportunity, and the children whom it seeks to serve have other urgent educational problems which the statute as presently conceived and funded does not begin to address.

In 1980, 107 million dollars were spent on Title VII programs. In the same year, three billion were appropriated under Title I.[74] If Title VII were in some way subsumed under Title I, more money might become available for bilingual education programs. The estimated number of children in this country judged to be in need of some kind of special language program ranges between three and a half and five million.[75] In 1980, 315,000, or at most 10% of the total, were served by federally funded programs.[76] As things now stand, limited-English speaking school children are not getting either a fair share or a fair shake. A tie-in with Title I could, if done

properly, correct this. It would not only increase the allocation for language programs but also, arguably, encourage multi-pronged approaches to their pressing educational problems. Given the present economic climate and the Reagan Administration's hostile view towards federally funded bilingual education programs, an amended Title I, setting aside, say 10% of all its monies for programs for limited-English speaking school children, may represent a politically tolerable solution, which is also a pedagogically effective one.

(b) Mandated Programs

(1) Title VI of the Civil Rights Act of 1964

(i) The Supreme Court in Lau v. Nichols

In 1974, the Supreme Court in Lau v. Nichols established the right of non-English speaking school children to a "meaningful" education under Title VI of the Civil Rights Act of 1965.[77] Reasoning that for students who do not understand English "there is no equality of treatment merely by providing the same facilities, textbooks, teachers and curriculum,"[78] the Court ruled that local school boards receiving federal assistance have an obligation to overcome the language deficiencies of these students. No specific remedy was urged.[79]

In reaching this decision, the Court relied heavily on interpretive regulations issued by the Department of Health, Education and Welfare (HEW) in its capacity as the federal agency "authorized and directed to effectuate [Title VI]."[80]

Under Title VI,

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance.[81]

Under the HEW regulations,

> Where inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instruction program to these students.[82]

The impact of the Court's decision was enormous. In unanimously upholding the HEW guidelines as an appropriate and permissible construction of Title VI, the Supreme Court ruled in effect that a school board's failure to take affirmative action to correct language deficiencies, "even though no purposeful discrimination [was] present,"[83] constituted unlawful national origin discrimination under the statute.

(ii) Administrative Rules, Regulations and Proceedings

Subsequent to Lau, HEW published in the summer of 1975 a policy document entitled Task Force Findings Specifying Remedies Available for Elimination Past Educational Practices Ruled Unlawful Under Lau v. Nichols, articulating the standards which the Department's Office for Civil Rights would apply in evaluating voluntary plans to eliminate Title VI violations resulting from the exclusion of students whose English was limited. Under the Lau Remedies, as this document came to be

known, school boards were required to provide instruction for elementary school children through their "strongest" language until they were able to participate effectively in an English language classroom.[84] In addition, they were required to provide effective instruction in English-as-a-Second-Language (ESL) to all students for whom English was not the "strongest" language.[85] Bilingual instruction was the preferred method of instruction and school boards were not permitted to rely exclusively on ESL instruction unless they could demonstrate that their programs were as effective as the types of programs described in the Lau Remedies.[86]

The Lau Remedies were widely distributed to school boards and the general public, and in addition, HEW set up a number of regional Lau centers to assist local school boards in their efforts to develop acceptable plans.[87] The guidelines were not, however, developed through the usual regulatory procedures employed to draft administrative rules and regulations, and they were not published in the Federal Register.[88] As a result, their authority is questionable. The courts have not as a matter of course "customarily" deferred to them in their determinations of statutory compliance,[89] and even the Office of Civil Rights acknowledges that the guidelines are inapplicable to an evaluation of the legal sufficiency of a district's language program.[90]

In response to this situation and to the widespread criticism of the Department's failure to issue formal guidelines, the Department of Education, under Secretary of Education Shirley

Hufstedler, released for comment on August 5, 1980, proposed regulations setting forth the standards and procedures school boards must follow in order to fulfill their obligations to limited-English speaking school children under Title VI.[91] Based on the Department's experience since Lau, the new regulations were intended to provide detailed and explicit guidelines for school boards required by law to establish compensatory language programs. Specifically, they prescribed transitional bilingual education as the preferred method of instruction.[92]

Barely six months later, the new Secretary of Education, Terrell H. Bell, announced that the Department was withdrawing the proposed regulations.[93] In giving the reasons for this action, Bell criticized the new regulations as inflexible and usurping. He denounced the regulations' policies favoring bilingual education over other methods of instruction for limited=English speaking school children, and, in keeping with the Reagan Administration's announced federalist policies, rejected the imposition of federal standards and controls in an area of activity traditionally reserved to the states.[94]

The Secretary's action reaffirmed the traditional working balance between the state and federal governments in our federal system.[95] By the Secretary's reading, Title VI imposed on the states an obligation to rectify the language deficiencies of limited-English speaking school children. It did not order a specific remedy.[96] Congress had acted on an ad hoc basis to accomplish a limited objective. The power to decide the method of implementing the federal objective was one which should be

left to the states. "Heavy handed" federal regulations in his view constituted unnecessary and unjustified intervention.[97]

The DOE's decision to withdraw the proposed guidelines does not affect the Department's power to review state plans or to insure that local school boards fulfill their statutory obligations under Title VI. The Lau Remedies remain in effect[98] and their continued use "permits elementary and secondary schools to operate bilingual education programs that meet local needs and broad national guidelines."[99] The Secretary's action does relieve the Department, however, of the power and responsibility to formulate educational policy for language minority school children and to establish federal regulatory norms and standards. Local school districts are now "permit[ted] . . . to use any [method of instruction] that has proved successful."[100] Each case will be judged on its own merits.

Although Bell's decision reflects a formal shift in policy, the Office of Civil Rights under President Carter issued a decision in the last month of that administration approving a program relying exclusively on instruction in English-as-a-Second-Language (ESL).[101] In that case, involving the Fairfax (VA) County Public Schools, 2700 students speaking 50 different languages were served by an ESL program which emphasized small classes and intensive English language instruction. No bilingual instruction was provided, although half of the teachers in the program were bilingual and the students were tutored in required subjects.

In approving the Fairfax plan, the OCR noted: (1) the district's commitment to the program, in terms of both funds and

personnel; (2) its systematic procedures for identifying, diagnosing, placing and instructing students; and (3) its evaluation reports demonstrating the effectiveness of the program. On this last point, although the evidence was limited, it tended to show that students in the program generally scored in the 50th percentile nationally in mathematics, sciences, social studies and language arts.[102]

At this writing, it is unclear whether future application of the Fairfax rule will be limited to programs serving a relatively small number of students speaking a wide variety of languages or will be excercised across-the-board. Either way, the decision signaled a change in the Department's view of what constitutes appropriate action and represented a significant departure not only from the policy informing the proposed guidelines which were pending at the time but also from established practice under the Lau Remedies. Previous to the Fairfax decision, a program which did not include a bilingual component was suspect.

(iii) The Supreme Court in Bakke

At about the same time the executive branch was revising its position under Lau, the federal courts were seriously questioning the continuing validity of that decision's rationale. Ever since University of California Regents v. Bakke[103] was decided in 1978, Lau has been under a cloud. At this writing, recent decisions augur its total eclipse. The issue is whether Lau remains good law.

In 1976, two years after Lau came down, the Supreme Court in

Washington v. Davis held that plaintiffs must prove discriminatory purpose or intent, and not simply discriminatory impact or effect, to establish a constitutional violation under the fourteenth amendment.[104] Two years later in Bakke, the Court after extensive analysis of the legislative history of Title VI, concluded that the definition of discrimination under Title VI was "absolutely coextensive"[105] with the constitutional definition under the equal protection clause, and that "Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment."[106]

As Lau had required only a showing of discriminatory "effect," the Court in Bakke speculated on the decision's continuing validity.

> We recognize that Lau, especially when read in light of our subsequent decision in Washington v. Davis, . . . which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.[107]

The Court in Bakke did not expressly overrule Lau, and it remains to be seen whether the Court will at some later date establish a basis for distinguishing between the two cases. As matters stand today, however, "the clear import of Bakke [is] that Title VI, like the Equal Protection Clause, is violated only

by conduct animated by an intent to discriminate and not conduct which, although benignly motivated, has a differential impact on persons of different races."[108] In the absence of purposeful discrimination, a state's failure to provide adequate or effective compensatory language programs for limited-English speaking children does not state a claim for relief under Title VI.

2. The Equal Educational Opportunity Act (EEOA)

Bakke and its progeny notwithstanding, limited-English speaking school children still retain the right to equal educational opportunity. A second and unexceptionable statutory basis exists under the Equal Educational Opportunity Act of 1974.[109]

Section 1703(f) of the EEOA provides in part that:

> [N]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . the failure by an educational agency to take appropriate action to overcome the language barriers that impede equal participation by students in its instructional program.

Under this section, it is an unlawful educational practice for any school district (and not only one receiving federal aid) to take appropriate action to overcome language barriers; under this section, a school district's failure to act violates the statutory mandate whether or not its conduct is motivated by an intent to discriminate. In contrast to Title VI which reiterates the constitutional standard, the EEOA prohibits conduct which the

Constitution standing alone would not forbid. The plain meaning of section 1703(f) makes this clear. Unlike subsections (a)[110] and (e)[111] of section 1703, subsection (f) does not explicitly incorporate an intent requirement; unlike subsection (d),[112] it does not implicitly incorporate the element of intent through the use of such words as "discrimination." Pursuant to its powers to enforce the fourteenth amendment, Congress in enacting section 1703(f) effectively codified the Supreme Court's decision in Lau, making the principle of Lau good law whether or not the decision constitutes a correct interpretation of Title VI. As Lau required school boards to take "affirmative steps," the EEOA requires them to take "appropriate action."

As in Lau, Congress did not in adopting the EEOA specify a particular type of remedial language program, but "intend[ed] to leave to state and local educational authorities a substantial amount of latitude in choosing the program and techniques they could use to fulfill their obligations under the Act."[113] At the same time, by identifying a serious problem in our nation's schools, by requiring affirmative measures to overcome them, and by creating a private right of action to enforce the obligation, Congress also intended to insure that school boards make a good faith effort consistent with local circumstances and resources to remedy the language deficiencies. The term "appropriate action" necessarily includes measures which will actually overcome the language problem.[114]

The responsibility for determining whether a school board has met its obligations under Section 1703(f) lies with the

federal courts.[115] It is a task they confront with considerable reluctance.[116] Education is historically a state function and even when federal principles limit the power of educational authorities to act, the federal courts are reluctant to interfere with the political power traditionally vested in the states to set curricula and establish minimal educational standards.[117] As the Fifth Circuit has written, "the entire question goes to a matter reserved to educators; other levels and branches of government are better able to assimilate and assess the knowledge of professionals in the field."[118]

Shaped to conform to these reservations, the judicial inquiry is threefold.[119] In the first instance, the Court must determine whether the educational theory or principle upon which the challenged program is based is a sound one. This task does not involve comparisons between competing theories. "Respected authorities legitimately differ as to the best type of educational program for limited English speaking students and . . . Congress in enacting 1703(f) [did not] inten[d] to make the resolution of these differences the province of the federal courts."[120] Rather, the Court's task is to determine whether the language program is "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."[121]

Following this determination, the Court must next decide whether the school board has devised a program which effectively implements the educational theory it has adopted. In this phase of the inquiry, the Court determines whether the board's program

is "reasonably calculated" to serve and advance the principles on which it rests.[122] This issue goes to such matters as course development, techniques, resources and staff.

Lastly, the Court must decide whether the program actually achieves its objectives. Good faith implementation of a sound educational theory will not suffice where it is shown that the program has not in fact overcome the language barriers of limited-English speaking students. School boards may not continue to employ a program which after a legitimate trial period fails to achieve its essential purpose.[123] In the last instance, "the proof of the pudding is in the eating: the proof of a school board's compliance with [federal] standards is the result -- the performance."[124]

II. CASE LAW

The "difficult responsibility"[125] of determining whether a school board has met its statutory obligations to limited-English speaking school children lies with the federal courts. As the Supreme Court wrote in the Brown Implementation Decision:

> Full implementation of these . . . principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing principles.[126]

In fulfilling this traditional judicial role, the federal courts are at every stage in the litigation process pressed to

strike a balance between a school board's obligation under federal law to overcome language barriers and its "undoubted" right to set curriculum.[127] In the liability phase, their task is to determine the statutory sufficiency of a program "without unduly substituting (their) educational values and thories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." In the remedial phase, it is to devise decrees which "adhere to established principles of equitable relief while according to school districts the greatest degree of autonomy in fulfilling their responsibilities under state law."[128] There is no statutorily preferred method of instruction and the states are free to use any plan or program so long as it is (1) premised on a legitimate educational theory, (2) implemented through the use of adequate technique, and (3) shown within a reasonable period of time to yield results demonstrating its effectiveness in overcoming language deficiencies. Where a program fails to meet this standard, a court will impose affirmative relief tailored to fit the scope of the violation.[129] There is no statutorily preferred method of fulfilling the obligation to take appropriate action and there is no legally mandated remedy for eliminating a violation.

The courts who have been faced with the problem of determining whether a school board has fulfilled its obligations to limited-English speaking school children have, in keeping with the statutory standard, resolved the issue in a wide variety of ways.

Lau v. Nichols

In 1974, in Lau v. Nichols, the Supreme Court held that a school district's failure to take "affirmative steps" to rectify the language deficiencies of non-English speaking children constituted an unlawful educational practice under Title VI of the Civil Rights Act of 1974.[130]

In Lau, 1800 non-English speaking school children of Chinese ancestry brought a class action against the San Francisco school system, claiming that its failure to provide instructional programs designed to meet their language needs violated their right to equal educational opportunity under Title VI and the fourteenth amendment of the Constitution. At the time suit was instituted, only 1000 of the 2856 non-English speaking students of Chinese ancestry enrolled in San Francisco schools were given supplemental instruction courses in English; plaintiffs sued to expand the program and to extend it to all affected school children. Both the district and circuit courts in Lau rejected plaintiffs' claims on grounds they had received "the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District."[131] In reversing the lower courts' decisions, the Supreme Court never reached the constitutional issue[132] but relied solely on Title VI and the regulations issued under it.[133]

At this writing, although the decision has never been expressly overruled, there are serious doubts concerning the correctness of the Court's premise in Lau. In University of

California Regents v. Bakke,[134] the Supreme Court held that Title VI prohibited only those uses of suspect criteria which would violate the fourteenth amendment, and that in the absence of a showing that defendant's conduct was intentionally discriminatory, it did not reach actions which merely had a differential impact on constitutionally protected minorities.

The doubt cast on Lau calls into question its authority as a basis for imposing affirmative obligations on the states. It does not, however, diminish its historical significance. As the only Supreme Court decision in this area of the law and the first federal statement of the right of non-English speaking school children to equal educational opportunity, it retains a certain vitality. At the least, it is a natural starting point for any discussion of the legal issues affecting the rights of limited-English speaking school children. More importantly, to the extent Congress's subsequent enactment of the EEOA signaled its approval of the Lau decision, Lau's analysis and discussion shed light on Congress's intentions when it subsequently directed the states to take "appropriate action" to overcome language barriers.

In Lau, "no specific remedy was urged" and the Court did not mandate a specific approach. As Justice Douglas noted,

> Teaching English to students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.[135]

In response of Lau, the San Francisco school system entered into a consent decree with plaintiffs under which it agreed to implement a bilingual-bicultural program for the 10,903 Chinese, Filipino, and Spanish speaking children in the district who comprised 82% of the school age population who spoke little or no English. In addition, the board agreed to implement ESL and other special language programs, including where practicable bilingual instruction, for the other non-English speaking students attending its schools.[136]

The scope of this remedial decree was broad, covering all students whose "inability to speak and understand English excluded [them] from effective participation in the educational program offered by a school district."[137] In subsequent cases defendants would press, often successfully, for a narrower definition of the eligible class and seek to restrict coverage to students who could participate more effectively in their native or home language than they could in English.[138]

Serna v. Portales Municipal Schools

Serna v. Portales Municipal Schools,[139] the next case to raise the claim that a school district's failure to provide remedial language instruction for limited-English speaking children violated the right to equal educational opportunity, involved a New Mexico school district which by law conducted all classes in English.

Instituted in 1972, Serna reached the Tenth Circuit Court of Appeals shortly after Lau came down. At trial, the district

court had held that the school board's policies violated plaintiffs' constitutional right to equal educational opportunity;[140] the school district with the support of the New Mexico Board of Education appealed. The Court of Appeals affirmed the lower court decision under Title VI, avoiding a constitutional determination.

In response to the lawsuit, the school district had come forward with a proposal to correct this situation; the district court, however, rejected its plan and ordered the implementation of a bilingual education program. On appeal of this part of the decision, the school district argued that the court's order constituted an unwarranted and improper judicial interference with the internal affairs of the district. The Court of Appeals disagreed. There was evidence, it noted, that the district's proposed program was only a token plan that would not benefit plaintiffs; under these circumstances, it ruled, the trial court had a duty to fashion a program which would provide adequate relief. It concluded:

> Under Title VI of the Civil Rights Act of 1964, appellees have a right to bilingual education. And in following the spirit of Swann, . . . we believe the trial court, under its inherent equitable power, can properly fashion a bilingual-bicultural program which will assure that Spanish surnamed children receive a meaningful education.[141]

Although the court here speaks in terms of the right to bilingual education under Title VI, an interpretation which neither Lau nor the legislative history supports, the decision

actually deals with the power of a federal court to fashion a remedy designed to eliminate a Title VI violation. On this point, its determination was unexceptionable. As a rule, where a school board has failed to meet its statutory obligations, a court may order the implementation of a bilingual education program which the statute, in the first instance, would not require.

The program of instruction, which the court approved, was by any standards also unexceptionable, mandating at the most only one hour of bilingual instruction a day. Its significant feature was the definition of the class of eligible students. The court defined the class as all Spanish surnamed students enrolled in the district and included within the scope of coverage even those students who were dominant in English.

Aspira of New York, Inc. v. Board of Education of the City of New York

Although Serna was the first case to prescribe a remedy, the Aspira consent decree,[142] entered in August 1974, represented the first serious attempt to devise a statutorily sufficient remedial language program.

In 1972, Puerto Rican students sued the New York City Board of Education, claiming that the board, in violation of Title VI and the fourteenth amendment, had failed to fulfill its obligations to limited-English speaking students enrolled in its schools. Challenging the sufficiency of the board's ESL program which serviced only a fraction of those standing in need of

compensatory language instruction, plaintiffs sought the institution of a city-wide bilingual-bicultural program.

The agreement of the parties reached after lengthy negotiation[143] required the Board of Education to develop a method of assessing the English and Spanish language skills of hispanic school children. Under the terms of the agreement, only those students who could participate more effectively in Spanish than in English were eligible. Students with severe English language deficiencies who were no more proficient in Spanish than they were in English were not covered by the decree.

As the first case to focus on the issue of defining the class of eligible students, Aspira testifies to the importance of the issue. In one document prepared in the course of litigation, the Board of Education used 13 different terms to define the pool of potentially eligible students,[144] and at every stage in the negotiations, it sought to define the class in its narrowest terms. Plaintiffs, on their side, sought to include all hispanic students who had problems speaking, reading, writing or understanding English.

Subsequent to Aspira, the Lau Remedies ratified its class definition and defined the class of students entitled to some form of bilingual education as "monolingual" and "predominant speakers of a language other than English."[145] In contrast, the Bilingual Education Act defined the class in far less stringent terms, as all children with "limited English speaking proficiency."[146]

As a result of this determination, the Aspira decree did not

cover all hispanic students with rights under Lau. It provided, however, a program of instruction for eligible students which Lau did not require. Under the agreement, instruction in the core curriculum and in courses required for promotion or graduation had to be offered in Spanish. In addition, the schools had to provide programs which developed the ability to read, write, speak and understand English. For these limited latter purposes, the decree permitted the use of ESL instruction; immersion and pull-out programs, however, were specifically prohibited.

In 1976, Richard Hiller and Herbert Teitlebau, counsel for plaintiffs in Aspira, described the decree as the most far reaching court-ordered bilingual education program since Lau.[147] At this writing, this statement is still true. Of the cases relying exclusively on a statutory claim, Aspira is still the most comprehensive.[148]

Otero v. Mesa County Valley School District No. 51

Otero,[149] the next case in the series, also focused on the question of eligibility. This time, however, the issue was litigated in the liability context. In Otero, the board had implemented a remedial language program prior to plaintiffs' institution of suit, and the court for the first time was asked to determine the "appropriateness" or adequacy of an existing program which was more than a "token" effort.[150]

In Otero, plaintiffs instituted a class action on behalf of

> [a]ll persons attending or entitled to attend Mesa County Valley School District No. 51 having a Spanish surname, and all other persons attending or

> entitled to attend such schools who consider themselves or are considered by the school or the community to be of Mexican American origin or ancestry, who are being denied an equal educational opportunity because of their race or national origin in that the District's curriculum, personnel, and other programs provide an inadequate or unequal educational service which does not take into account their linguistic or cultural differences.[151]

Claiming that the school district's program was "incompatible" with the "learning style" of Chicano students, plaintiffs argued that it produced unequal benefits on the basis of national origin, in violation of the right to equal educational opportunity under the equal protection clause and Title VI.[152]

In discussing the constitutional claim squarely presented in the case, the court rejected plaintiffs' argument that the district's "failure" to adapt its program to the cultural and linguistic needs of minority students violated the fourteenth amendment. There was no finding of segregation or other intentionally discriminatory course of conduct, and under Tenth Circuit law, there was no constitutional right to differential treatment merely because a program was shown to benefit some students more than others.[153]

As to plaintiffs' claim that the school board's conduct violated Title VI, the court held that too few students were involved to warrant a finding that the board had failed to overcome language barriers. Only an extremely small number of Mexican American students had any problem speaking or understanding English, and those who did had even greater problems in Spanish. At the same time, fewer than 3% of the Mexican-American children enrolled in the elementary schools had

any proficiency in speaking or understanding Spanish.[154] Given these factors, the court concluded, the evidence failed to show that the educational problems of the affected class were fairly attributable to language deficiencies.[155] Moreover, the district was making a "real conscientious effort to recognize, face and solve any problem which . . . exist[ed] as to any students." The court "could do no better."[156]

The court's finding[157] that there were insufficient numbers of students involved to trigger a Lau violation was based on the concurring opinion of Justice Blackmun in Lau and some Tenth Circuit dictum in Serna. As the fifth and deciding member of the Court in Lau, Justice Blackmun had qualified his support for the result in Lau. "For me," he wrote, "numbers are at the heart of the case and my concurrence is to be understood accordingly."[158] The Court of Appeals in Serna agreed: "Only when a substantial group is being deprived of a meaningful education will a Title VI violation exist."[159]

Morales v. Shannon

Morales[160] was the first decision by a federal Court of Appeals to impose affirmative obligations on a school board under section 1730(f) of the EEOA. It is best known, however, for its succinct statement on the role of the federal courts in determining the appropriateness of a school district's remedial language program: "It strikes us," the court wrote, "that the entire question goes to a matter reserved to educators."[161]

In Morales, plaintiffs claimed that the school board's

refusal to implement a bilingual-bicultural program which was "necessary to permit Mexican American students enrolled in its schools to continue to develop intellectual capacity in Spanish while gradually becoming proficient in English" constituted a "form of continuing discrimination" in violation of their constitutional and statutory rights.[162] The court upheld plaintiffs' statutory cause of action. It did not, however, grant the relief plaintiffs sought. Taking notice of the fact that the state had recently enacted legislation requiring bilingual-bicultural programs in its elementary schools, the court remanded the case with instructions to the district court to determine on a fresh record whether the school board had under the new state law met its federal obligations.[163] "It is now," it declared, "an unlawful educational practice to fail to take appropriate action to overcome language barriers. Section 204(f) of the Equal Educational Opportunity Act of 1974."[164]

Cintron v. Brentwood Union Free School District Board of Education

In Cintron,[165] the Brentwood School system had sought in the face of teacher cutbacks to restructure its bilingual education program. Plaintiffs, hispanic school children enrolled in the program, sued, claiming the Board's intention to dismantle the existing program and to substitute an English immersion program violated their right to equal educational opportunity under the EEOA. The court sustained plaintiffs' claim that the proposed immersion program was inadequate; it refused, however, to

reinstate the old program and directed the district to submit in its place a new plan which complied with the Lau guidelines.

The decision in Cintron attempts to accomodate competing rights and interests. In 1975, two years before plaintiffs instituted the instant action, the school district, faced with declining enrollments, sought to reduce its elementary school teaching staff; rather than dismiss the recently hired bilingual education teachers whose services it needed, however, it sought to dismiss regular classroom teachers. Facing dismissal, nine of these teachers sued the district in the state courts, claiming the board's action violated their contract rights under New York state law. The state courts agreed and directed the district to terminate teachers strictly on the basis of seniority.[166] Under this decree, the board reinstated the teachers who had brought suit and dismissed instead in 1977 the 40 teachers in the district with the least seniority, including 15 fulltime and 2 parttime bilingual education teachers.[167] As a result, the district could no longer operate its bilingual education program -- out of 24 fulltime positions, only seven remained -- and it moved quickly to restructure. Plaintiffs promptly instituted the present action.

The court in Cintron never faced directly the issue whether the rights of limited-English speaking school children under federal law superceded the contract rights of school teachers under state law. Instead, in a vaguely worded order, it left to the board the problem of sorting out the conflicting obligations:

> Brentwood is directed to submit a plan in compliance with the Lau Guidelines. The regulations permit latitude in organizing a bilingual program. The task is not an easy one. The goal is instruction by competent bilingual teachers in the subject matter of the curriculum while at the same time teaching non-English-speaking children the English language. The time limitation of the school day is an obstacle that may be overcome by supplementary programs to achieve both goals.[168]

The court was less vague in its treatment of the district's old and new programs. In reaffirming the Lau Remedies, the court's final order repudiated both.

Plaintiffs had sought in instituting the action to force the board to reinstate the old program. For reasons unrelated to the practical problem of staffing, the court refused to grant this relief. The old program it ruled, had been improperly administered and to the extent it had operated as a maintenance program, discouraging transfer and retaining students who had achieved proficiency in English, it was a "perversion" of the federal statutory mandate and a "misuse of funds."[169] The new program was also in the court's view defective. Its underlying theory, the court however ruled, overlooked the declared policies and findings of Congress and its objective of accelerating the acquisition of English could not overcome its inherent defects.[170]

Given the size of the affected student body, the Court's order imposing a bilingual education program appears to be an appropriate one.[171] Its declaration, however, that under all circumstances bilingual education is required overstates the case. A school board must take "appropriate action" to overcome language barriers and when it fails to take action, a court will fashion a remedy "tailored" to fit the scope of the violation.

Rios v. Reed

Subsequent to Cintron, a federal court sitting in the Eastern District of New York, relied on the earlier decision to hold in Rios v. Reed[172] that a school board's failure to implement a bilingual-bicultural education program violated the right of limited-English speaking school children to equal educational opportunity. Citing with approval the decision in Cintron, the Court ruled:

> The purpose of the statutes, i.e., Title VI, section 204(f) of the Equal Educational Opportunity Act of 1974, the Bilingual Education Act of 1974, and the Civil Rights Act of 1871, as they relate to bilingual education, is to assure the language deficient child that he or she will be afforded the same opportunity to learn as that afforded his or her English-speaking counterpart. Taken together, the statutes, and the legislative history, see discussion in Cintron . . ., mandate teaching such children subject matter in their native tongue (when required) by competent teachers. Though not expressly provided by the statute, the legislative history suggests that the program must also be bicultural as a psychological support to the subject matter instruction. . . .[173]

The court maintained this position in the face of the school board's argument that its existing ESL program was "highly effective and successful in achieving its objectives."[174] Taking the view that limited-English speaking school children had a right to attain parity in the standard instructional program, the court held:

> A denial of educational opportunity to a child in the first years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction. While the District's goal of teaching Hispanic

> children the English language is certainly proper, it cannot be allowed to compromise a student's right to meaningful education before proficiency in English is obtained.[175]

Subsequently, the Fifth Circuit in Castenada v. Pickard would resolve the problem of parity in a way which corresponded more closely with the language and purpose of the act.[176]

As the above excerpt indicates, the court also directed the district to include within its program of instruction a bicultural component. This part of the ruling was premised on the claim that adding a bicultural component "demonstrating appreciation for the cultural heritage of such children,"[177] increases the effectiveness of the program by fostering in the children self-esteem and a legitimate pride in both cultures. This position is one of long standing. As Joshua Fishman has written, however, there is hardly any research pertaining to such claims in conjunction with bilingual education. "In this context," he notes, "it is primarily an article of faith, a moral and ethical position, a basic social right and as such, not likely to benefit from, or to be subjected much to, objective and empirical research."[178]

The court's decision in Rios reflected this attitude. In boosting a moral and ethical position to a statutory right, however, the court hastened to add that the district was not obligated to offer a program of "indefinite duration for instruction in Spanish art and culture." The purpose of bicultural education, it cautioned, was to enhance a child's learning ability, not to establish a bilingual society.[179]

This last cautionary note is sounded in response to those critics of bilingual education who misconstrue its aims and intentions. Public resistance to bilingual education is rooted in part in the irrational fear that these programs will lead to the "balkanization" of the United States.[180] Pointing to Quebec, its critics argue that bilingual education undermines the "linguistic integrity" of the country and fosters the development of regional autonomy movements.[181]

Putting aside the fact that the United States lacks the institutional framework to service and support a multi-lingual society,[182] and the fact that linguistic assimilation, even in the Hispanic community, is occurring at a rapid rate,[183] these arguments fail to take account of the purpose of the statutory obligation to provide compensatory language instruction.

The statutory mandate implicitly recognizes the supremacy of the English language and the importance of mastering it. The right of limited-English speaking school children to compensatory language instruction is premised on the judicial finding that "students who do not understand English are effectively foreclosed from any meaningful education."[184] As the Supreme Court observed in Lau, English is the official language of instruction in our nation's public schools, and "basic English skills are at the very core of what these public schools teach."[185] A school board's obligation is to rectify the English language deficiencies of limited-English speaking children, not to maintain their native language skills and ability. Compensatory language programs are transitional programs designed

to ease the way for limited-English speakers until they can function effectively in a classroom where the instruction is carried on exclusively in English.

Guadalupe Organization, Inc. v. Tempe Elementry School

In Guadalupe, plaintiffs went the next step and brought an action to compel the school district to implement a program of instruction which "ha[d] as its goal having a child graduate at each grade level from kindergarten to fourth year in high school competent and functional in reading, writing, and comprehension [sic] both in the child's own language, Spanish, and the language of the majority culture, English."[186]

In bringing suit, plaintiffs did not challenge the sufficiency of the district's existing program; rather, they contended, the district was obligated under the fourteenth amendment, Title VI, and the EEOA to implement the program they sought to impose.

The court disagreed. In dismissing the constitutional claim, the Ninth Circuit held that the fourteenth amendment neither required nor prohibited the kind of instructional program plaintiffs sought. There was no claim by plaintiffs of unconstitutional discrimination on the basis of national origin nor any ground for asserting that the state had violated their right to education. As to the statutory claim, the issue, it said, was whether "appropriate action must include the bilingual-bicultural education the [plaintiffs] seek." The court held that it need not.[187]

Valadez v. Graham
Martin Luther King Junior Elementary School Children v. Michigan Board of Education
Heavy Runner v. Bremmer

The next three cases to address the problem of educating limited-English speaking children presented the issue of eligibility in new form. In these cases, the courts were asked to determine the nature of the rights of migrant workers, blacks, and Blackfeet Indians to remedial language programs, and to address issues and claims which were not typically raised in suits brought by the more traditional groups of limited-English speaking school children.

In Valadez v. Graham,[188] the court was asked to determine whether a school board's policies governing late entry and make-up work violated the constitutional and statutory rights of the children of migrant workers.

In determining they did not, the court rejected plaintiffs' contention that the policies unconstitutionally discriminated against them on the basis of national origin. Only 50% of the migrant children were classified as Mexican-American and the school board applied its policies across the board to all late entering children of migrant workers, black, white or Mexican-American. The court also rejected the statutory claim. It noted that on average only 22 migrant children of any background or nationality entered the schools after the first four weeks of term and that these 22 were too few to trigger a Title VI violation even if the court could assume, after Bakke, one could be shown. Citing Justice Blackmun's "caveat" in his concurring opinion in Lau that "numbers are at the heart of this

case," the court ruled that "only when a substantial group is being deprived of a meaningful education will a Title VI violation exist."[189]

In Martin Luther King Junior Elementary School Children,[190] plaintiffs, a class of "culturally, socially and economically deprived" black school children,[191] alleged inter alia that the school board's failure to provide special services to overcome their language deficiencies constituted an unlawful educational practice under the Equal Educational Opportunity Act of 1974. Specifically, they claimed that, as

> a class of black, economically disadvantaged children living in the social isolation of a housing project, they speak a vernacular of English, referred to as "Black English" which is so different from the English commonly spoken in the public schools as to constitute a language barrier which impedes their equal participation in King School's instructional program.[192]

Noting that the federal courts had not before addressed the issue whether the "language barriers" specified in the act meant only foreign language barriers or included as well the barriers standard English presents to "Black English" speaking children, the court, after reviewing statutory history,[193] found that barring more explicit legislative guidance to the contrary, "section 1703(f) [of the EEOA] applies to language barriers of appropriate severity encountered by students who speak 'Black English' as well as the language barrier encountered by students who speak German."[194] Accordingly, the school was directed to implement a program designed to overcome the language problems of "Black English" speaking children.

This case, popularly denominated the "Black English" case, has been widely criticized, and the programs subsequently implemented to teach teachers "Black English" have been characterized by its critics as unfortunate but not atypical examples of what happens when the federal courts intervene in the operation of public schools.

To some extent, this criticism is just; it overlooks, however, the problem the court faced in resolving plaintiffs' claims. As the EEOA addresses the educational needs of a deprived and disadvantaged group of school children exclusively in terms of their language ability, the court had very limited options. In King, plaintiffs had alleged that the school board's

> fail[ure] to determine whether plaintiffs' learning difficulties stem from cultural, social and economic deprivation and [its failure] to establish a program which would enable plaintiffs to overcome the cultural, social and economic deprivations which . . . prevent them, in varying degrees, from making normal progress in school . . .

violated their constitutional and statutory rights.[195] Their claim that the school board had failed to overcome their language problems was only one of several they raised and peripheral to the gravamen of their complaint. Unfortunately, it provided their only basis for relief. The court could not, under established principles of law, grant the wider relief they sought. Culturally, socially and economically deprived children have no basis for claiming an entitlement to educational services. If plaintiffs were not, as they argued, "getting books and materials relied upon by [their] teachers to prepare other

children, such as reading materials available in the homes of middle and higher income students," no law had been broken.

Given this situation, the problem with the decision in King is not that it requires teachers to teach in "Black English" but that it places the burden of overcoming the myriad needs of a deprived group of children on a statute designed to rectify language deficiencies.[196]

In Heavy Runner v. Bremmer,[197] the third case in this series, the Court ruled that the Browning and Heart Butte School district, in violation of section 1703(f) of the EEOA, had failed to take appropriate action to overcome the language problems of the Blackfeet Indian children attending its schools.

This decision was expected. Unlike Valadez and King, Heavy Runner did not require any analysis of issues different from those which normally arise in cases involving limited-English speaking students defined in terms of their national origin. It belongs with King and Valadez, however, because like them, it raises issues peculiar to the group of students involved.

Bilingualism has long been an "Indian issue" and bilingual education has for several years formed an integral part of the curriculum of reservation schools. For the Indian community, however, bilingual education is a tool of the movement toward national sovereignty. Its uses and purposes have not been to overcome English language deficiencies but to resist linguistic assimilation and to promote national identity. It is a political issue, not an educational issue, and one which rarely arises in a litigation context.[198]

Non-English speaking Indian children usually come from Indian communities where there is little Anglo contact or where the traditional society is strong and cohesive. On the other side, few if any Native Americans living in urban communities grow up with an Indian language as their primary language.[199] Against this background plaintiff's action in Heavy Runner to compel the district to implement a bilingual education program designed to overcome language barriers appears to augur a shift in traditional Indian language policies and goals.

Castenada v. Pickard

Castenada v. Pickard[200] is the most recent case to address the rights of limited-English speaking children to compensatory language instruction. It is also, at this writing, the most important and authoritative. In addition to the fact that it resolves a significant issue never before raised, it is the first decision by a federal Court of Appeals (1) to express doubts over the continuing validity of the premise in Lau;[201] (2) to determine that Congress's intention in enacting the EEOA was not to prescribe a particular course of instruction but to leave to the states the task of devising, at least in the first instance, solutions to the educational problems of limited-English speaking children;[202] and (3) to construct a formal analytic framework for determining whether a school board has taken "appropriate action."[203]

The specific issue presented in Castenada was whether a program of instruction which placed primary emphasis on the

development of English language skills was in terms of the statutory mandate an effective one. Plaintiffs claimed it was not and argued that a program stressing English language skills failed to provide adequate instruction in other subjects. As a result, they contended, students placed in the program fell behind in these subjects and could not participate equally in the regular course of instruction.

Prior to Castenada, in Rios v. Reed, the court there implicitly recognized the problem of parity when it declared that "the district's goal of teaching Hispanic children the English language . . . cannot be allowed to compromise a student's right to meaningful education before proficiency in English is obtained."[204] It did not, however, address the issue directly, but concluded as a matter of law that limited-English students had a right to bilingual education.

The Court of Appeals rejected this approach. Although it agreed that the statute required that school boards not only overcome the language barriers impeding equal participation but also provide supplemental instruction in other areas of the curriculum, it ruled that the EEOA left school boards free to determine whether these obligations should be met simultaneously or sequentially.[205] A district which chose first to focus on English language skills and later to provide compensatory instruction in other subjects had, in the court's view, fulfilled its statutory obligations. There was, according to the court, no single preferred method of meeting the "dual challenge" posed by the statute.[206] So long as the program was reasonably calculated

to enable limited-English speaking children to attain parity in the standard instructional program within a reasonable period of time, the school district was free to determine not only the manner of instruction but also the sequence.

In reaching this conclusion, the court developed a method of analysis which permitted it to decide the issue at hand in a principled manner consistent with the statutory language and purpose. It also provided future courts with a rational and systematic framework for resolving related issues. Prior to Castenada, litigation in this area of the law seemed to proceed less on a case-by-case basis than on a purely ad hoc basis, and there appeared to be no way of reconciling the decisions let alone achieving a synthesis. Castenada changed this, and its analyses and conclusions have throughout this paper served to define the issues and inform the discussion.[207]

Beyond Castenada

Notwithstanding its considerable achievement, Castenada is not the last word on the subject of compensatory language instruction. In reaching its conclusion that the school board had taken "appropriate action" to overcome language barriers, the Fifth Circuit focused on the problem of determining whether the board had violated its statutory obligation. It did not address the problem of devising an appropriate remedy where it is shown that a board has failed to meet its affirmative obligations.

Subsequent to Castenada, the Fifth Circuit in United States v. Texas[208] reversed a district court order requiring the State

of Texas to improve and expand its programs in bilingual education. Although the Court of Appeals upheld the district court's finding of a statutory violation, noting that "in some areas[,] local programs for remedying the educational handicaps of limited-English speaking students were deficient,"[209] it held that the Texas legislature's recent enactment of the 1981 Bilingual and Special Language programs Act made the lower court's injunctive relief unnecessary.[210] The lower court decision had relied on expert testimony detailing the inadequacies of Texas's 1973 Act, not its 1981 Act,[211] and had not tested the latter legislation against Castaneda's three-pronged analysis. In these circumstances, the lower court's judgment could not "legitimately be sustained" under section 1703(f) of the Equal Educational Opportunity Act of 1974.[212]

In remanding the case for reconsideration in light of the new act, the Fifth Circuit reaffirmed its earlier ruling in Castaneda that Congress in enacting the EEOC "'intended to leave to state and local educational authorities a substantial amount of latitude in choosing the program and techniques they would use.' 648 F.2d at 1009."[213] It failed to indicate, however, that Castaneda never addressed either directly or by implication the issue of determining an appropriate remedy should a statutory violation be discerned, but limited its inquiry to the question of how to determine whether a violation of the statute had occurred.[214] In consequence, although the Fifth Circuit's decision to remand for reconsideration in light of the later act is sound,[215] by failing to distinguish between the elements of a

statutory violation and the elements of relief for that violation, it gives a misleading impression of the role of the federal judiciary generally in redressing the consequences of illegality.

"Neither Castenada nor any other legal precedent limits relief to a declaratory judgment of wrongdoing, leaving the eradication of illegality to the unfettered discretion of those who have been found in violation of the law."[216] A school board is free only in the first instance to devise an "appropriate" program of instruction. After a statutory violation has been shown, the responsibility for determining an appropriate remedy lies with the judiciary. Castenada holds, and correctly so, that bilingual education is not the only acceptable method of instruction for meeting the needs of limited-English speaking school children under section 1703(f) of the EEOA. It does not hold, and could not under our system of law, that after a statutory violation has been proved, a court may not order the implementation of a bilingual education program. At that point, in the absence of recently enacted legislation,[217] it is too late in the day for defendants to contend they should be accorded the discretion to take measures of their choosing.[218]

III. CONCLUSION

In the aftermath of Lau, bilingual education came into its own. Not only did a majority of the states pass legislation addressing the educational problems of limited-English speaking

children, but several of them specifically mandated bilingual education programs.[219] At the same time, in fulfillment of their federal obligations under Title VI and the EEOA, school boards across the country implemented bilingual education programs with funds made available under the Bilingual Education Act.[220]

Against this background, the federal courts, faced with suits challenging the legal sufficiency of existing programs under Title VI and the EEOA, tended in the immediate post-Lau era to favor bilingual education over other kinds of compensatory language programs.[221] Recently, this has changed. In keeping with the shifting mood of the country and the shifting policies of the executive branch, the courts have been giving the statutory language a more literal construction and refusing to infer Congressional intent to favor bilingual education over other kinds of "appropriate" or "affirmative" compensatory language programs.[222] As a result, bilingual education is viewed as a compensatory method of instruction which a school board might choose to implement in order to fulfill its federal obligations or a court might impose on a board which has failed to fulfill its obligations. It is not deemed a right or entitlement. Non-English speaking students have a right to a "meaningful" education;[223] school districts have a duty to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[224] There is, however, no statutorily preferred method of enforcing these rights and obligations. "Teaching English to the students . . . who do not speak the language is one choice.

Giving instruction to this group in their native language is another. There may be others."[225]

Footnotes

1. 42 U.S.C. §2000d.

2. HEW Memorandum of May 25, 1970, 35 Fed.Reg. 11575, construed in Lau v. Nichols, 414 U.S. 563 (1974).

3. 20 U.S.C. §1703 et seq.

4. §1703(f).

5. H. Wechsler, "The Political Safeguards of Federalism - The Role of the States in the Composition and Selection of the National Government," Principles, Politics and Fundamental Law 49-82 (1961).

6. 42 U.S.C. §2000d-1.

7. Brown v. Board of Education, 349 U.S. 294 (1955) (Implementation Decision).

8. Id.

9. 414 U.S. 563 (1974).

10. In Ashwander v. Tennessee Valley Association, Justice Brandeis noted that the Supreme Court had "developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all constitutional questions pressed upon it for decision." Among these rules, the fourth provides that "[t]he Court will not pass upon a constitutional question although properly presented by the record if there is also some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." 297 U.S. 288 (1936) (concurring opinion).

11. See Guadalupe Organization, Inc. v. Tempe Elementary School, 587 F.2d 1022 (9th Cir. 1978), Otero v. Mesa County Valley School District No. 51, 408 F.Supp. 162 (D. Colo. 1975), vacated on other grounds, 568 F.2d 1312 (10th Cir. 1977).

12. 521 F.2d 465, 482 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976).

13. "No State shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, §1.

14. "[T]he [Supreme] Court's decisions have established that classifications based on alienage, . . . nationality or race, are inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365 (1971).

15. Where the state has undertaken to provide education, it must be made available to all on equal terms. Brown v. Board of Education, 347 U.S. 483 (1954). Education is not, however, a right protected by the Constitution except, perhaps, insofar as some minimum identifiable quantum is a prerequisite to the meaningful exercise of First Amendment freedoms or the right to vote. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 35-37 (1973). In light of these constitutional principles, a school district's failure to adapt to the needs of language minority school children does not violate the Fourteenth Amendment. Keyes, 521 F.2d at 483.

16. Green v. New Kent County Board of Education, 391 U.S. 430 (1961).

17. Guadalupe, 587 F.2d at 1028.

18. Castaneda v. Pickard, 648 F.2d 989,1007 (5th Cir. 1981).

19. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

20. 20 U.S.C. §1703 et seq.

21. Title VII of the Elementary and Secondary Education Act, §701 et seq., 20 U.S.C. §3221 et seq. (1978).

22. 20 U.S.C. §§881-886 (1968).

23. In drafting the original bill, its sponsors had identified the student population it had to serve as "culturally and linguistically different." On the recommendation of the U.S. Commission on Civil Rights, however, this term was replaced by "limited-English speakers," on grounds that the latter designation had become a term of "art", generally understood and neutral in its implications. S.C. Schneider, Revolution, Reaction or Reform: The 1974 Bilingual Education Act 51 (1976). For a definition of the term "limited English-speaking ability," see section 702, 20 U.S.C. §882 (1968).

24. §704(a), 20 U.S.C. §884(a)(1968).

25. Schneider, supra note 23, at 22.

26. Title VII, Findings of Congress, §701 (1968).

27. §703(a), 20 U.S.C. §883(a)(1968).

28. §704, 20 U.S.C. §884 (1968).

29. The House Committee on Title VII noted that bilingual education was generally regarded as the most efficacious method of resolving the language problems of limited-English speaking children. H.R. Rep. No 915, 90th Cong., 1st Sess.5 (1967). See Schneider, supra note 23, at 25.

30. S. Rep. No. 726, 90th Cong., 1st Sess. 50 (1967). See also Schneider, supra note 23, at 23.

31. See infra pp.21-22.

32. Funding under Title VII had been extended only through the fiscal year 1973. In consequence, immediate action was necessary to keep existing bilingual programs going. Schneider, supra note 23, at 42.

33. Schneider, supra note 23, at 41.

34. 20 U.S.C. §880b (1974).

35. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

36. Id. at 1008-1009.

37. §704, 20 U.S.C. §884 (1968).

38. Conference Report, S. Rep. No. 1026, 93d Cong., 2d Sess. 149-154 (1974).

39. §702, 20 U.S.C. §882 (1968).

40. §702(a)(4), 20 U.S.C. §880b(a)(4)(1974) (emphasis added).

41. See §§702, 704(a)(B) and (C), 20 U.S.C. §§882, 884(a)(B) and (C) (1968).

42. §702(a)(5)(B), 20 U.S.C. §880b(a)(5)(B) (1974) (emphasis added).

43. §704 (c)(1), 20 U.S.C. §884(c)(1) (1968) (emphasis added).

44. §721 (a)(1), 20 U.S.C. 880b-7(a)(1) (1974) (emphasis added).

45. §702 (a)(5)(A), 20 U.S.C. §880b(a)(5)(A) (1974).

46. §702(a)(5)(B), 20 U.S.C. §880b(a)(5)(B) (1974).

47. Schneider, supra note 23, at 164.

48. §702(a)(5), 20 U.S.C. §880b(a)(5) (1974).

49. U.S. Commission on Civil Rights, The Excluded Students 28 (1972).

50. 414 U.S. 563 (1974).

51. 120 Cong. Rec. S179 (daily ed. Jan. 22, 1974).

52. "The most basic question which arises after Lau concerning the future direction of Federal bilingual programs is whether the Federal government should undertake to assist local educational agencies in implementing the requirements of Lau (i.e. basic bilingual services support) or whether such programs should continue to be of a supplementary nature, focusing on such matters as professional development, cultural heritage studies, and adult and community programs. There is nothing in Lau which speaks one way or another concerning the appropriate Federal role...."

HEW Memorandum of January 25, 1974, cited in Schneider, supra note 23, at 105.

53. See Schneider, supra note 23, at 131.

54. The question of creating a federally-funded entitlement program was not addressed in 1974. Subsequently, it presented itself as an issue in 1978 when Congress again amended the Bilingual Education Act. See infra p. 13.

55. S. Rep. 763, 93d Cong., 2d Sess. 43 (1974). Funding under the 1974 Act ranged from $135,000,000 in 1974 to $160,000,000 in 1978.

56. 120 Cong. Rec. H584 (daily ed. Feb. 6, 1974).

57. 20 U.S.C. §3221 et seq. (1978).

58. S. Rep. No. 856, 95th Cong., 2d Sess. (1978).

59. §702(a) and (b), 20 U.S.C. §3222(a) and (b) (1978).

60. §731(f), 20 U.S.C. §3241(f) (1978).

61. See infra pp.21-22.

62. Hearings on H.R.7819 Before the General Subcommittee of the House Committee on Education and Labor, 90th Cong., 1st. Sess. (1967).

63. Schneider, supra note 23, at 25. In 1980, $107 million was appropriated under the Bilingual Education Act. In the same year, $3 billion was appropriated under Title I. See A. Pifer, Bilingual Education and the Hispanic Challenge, Annual Report, Carnegie Corporation of New York 4 (1979).

64. Title I of the Elementary and Secondary Education Act, 20 U.S.C. 2701 et seq. (1965), was the first federal assistance program for elementary and secondary schools.

65. See, e.g., Martin Luther King Junior Elementary School Children v. Michigan Board of Education, 451 F.Supp. 1324 (E.D. Mich. 1978); see infra pp.48-49.

66. See Pifer, supra note 63, at 10-12.

67. B. Cohen, The Truth About Bilingual Education, Bilingual Journal 16 (1978).

68. J. Fishman, Bilingual Education--A Perspective, 12 IRCD Bulletin 7 (1977).

69. Id. at 5.

70. Id.

71. Id.

72. Id. at 6.

73. Id.

74. See supra note 63.

75. Schneider, supra note 23, at 42-43.

76. See Pifer, supra note 63, at 4.

77. 414 U.S. at 568.

78. Id. at 566.

79. Id. at 564-565.

80. 42 U.S.C. §2000d-1.

81. 42 U.S.C. §2000d.

82. HEW Memorandum of May 25, 1970, 35 Fed. Reg. 11595.

83. Lau, 414 U.S. at 568.

84. Proposed Rules on National Origin Discrimination in Elementary and Secondary Schools, 45 Fed. Reg. 52052, 52055 (1980) (to amend 34 C.F.R. §100) (proposed August 5, 1980; withdrawn February 2, 1981).

85. Id.

86. Id.

87. Id.

88. Id.

89. Castaneda, 648 F.2d at 1007.

90. Id. at 1006.

91. Proposed Rules, 45 Fed. Reg. 52052.

92. 45 Fed. Reg. 52069 (to be codified at 34 C.F.R. §100.39).

93. Withdrawal of Notice of Proposed Rulemaking, 46 Fed. Reg. 10516. (1981).

94. Statement by Terrell H. Bell, Secretary of Education (February 2, 1981).

95. See Wechsler, supra note 5.

96. Statement by Terrell H. Bell, supra note 94.

97. Id.

98. Fact Sheet on Withdrawal of Proposed Lau Rules (February 2, 1981).

99. Id.

100. Statement by Terrell H. Bell, supra note 94.

101. Letter from Antonio J. Califa, Deputy Assistant Secretary, U.S. Dept. of Education, to Dr. Linton Deck, Division Superintendent, Fairfax County Public Schools (December 30, 1980) (notification of compliance).

102. Id.

103. 438 U.S. 265 (1978).

104. 426 U.S. 229 (1976).

105. 438 U.S. at 352.

106. Id. at 287 (Powell, J., concurring).

107. Id. at 352.

108. Castaneda, 648 F.2d at 1007.

109. 20 U.S.C. §1703 et seq.

110. Section 1703(a) provides that no State shall deny equal educational opportunity by "the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools."

111. Section 1703(e) forbids "the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color or national origin among the schools of such agency."

112. Section 1703(d) forbids "dicrimination by an educational agency on the basis of race, color or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff,..."

113. Castaneda, 648 F.2d at 1009.

114. Id. at 1010.

115. §1706.

116. Castaneda, 648 F.2d at 1009.

117. See Griggs v. Cook, 272 F.Supp. 163 (D.C. Ga., 1967), aff'd 384 F.2d 705 (5th Cir.).

118. Castaneda, 648 F.2d at 1007.

119. This method of analysis was developed by the Court of Appeals for the Fifth Circuit in its decision in Castaneda, 648 F.2d at 1009-10.

120. Id. at 1009.

121. Id.

122. Id at 1010.

123. Id.

124. United States v. Jefferson City Board of Education, 372 F.2d 836, 894 (5th Cir. 1966), cert. denied 389 U.S. 840 (1967).

125. Castaneda, 648 F.2d at 1009.

126. 349 U.S. 294.

127. See supra note 117.

128. Castaneda, 648 F.2d at 1009.

129. United States v. Texas, 523 F.Supp. 703, 735 (E.D. Tex. 1981).

130. 414 U.S. 563 (1974).

131. 483 F.2d 791, 793 (9th Cir. 1973), reh'g denied en banc 483 F.2d 805, quoting from unreported district court opinion. Civil No. C-70, 627 LHB (N.D. Cal. May 26, 1970).

132. See supra note 10 and accompanying text.

133. See supra notes 77-83 and accompanying text.

134. 483 U.S. 265 (1978). See supra notes 103-108 and accompanying text.

135. 414 U.S. at 564-565.

136. M. Teitelbaum & R. Hiller, The Legal Perspective, Bilingual Education: Current Perspectives--Law 8-9 (1977).

137. 414 U.S. at 565 (emphasis added).

138. See infra notes 143-146 and accompanying text.

139. 409 F.2d 1147 (10th Cir 1974).

140. 351 F.Supp. 1279 (D.N.M. 1973).

141. 409 F.2d at 1154.

142. 72 Civ. 4002 (S.D.N.Y. August 29, 1974).

143. For a full discussion of history, background and effects of the Aspira consent decree, see I. Santiago, A Community's Struggle for Equal Educational Opportunity: Aspira v. Bd. of Ed. (1978).

144. Santiago, supra note 143, at 64.

145. See Lau Remedies at 2; see also supra notes 84-85 and accompanying texts.

146. 703(a)(1), 20 U.S.C. §3223(a)(1).

147. Teitlebaum & Hiller, supra note 136, at 12.

148. This study focuses on the nature of the right to compensatory language instruction. As there is no constitutional right, but only a statutory one, the paper does not discuss the cases which have ordered the inplementation of compensatory language programs to remedy constitutional violations of the right of minority school children to equal educational opportunity.

149. 408 F.Supp. 162 (D. Colo. 1975), vacated on other grounds, 568 F.2d 1312 (10th 1977), on remand, 470 F.Supp. 326 (1979).

150. 408 F.Supp. at 171.

151. Id. at 163.

152. Id. at 163-64.

153. Id. at 168-70.

154. Id. at 165.

155. Id.

156. Id. at 171.

157. Id.

158. 414 U.S. at 572.

159. 499 F.2d at 1154.

160. 516 F.2d 411 (5th Cir. 1975), cert. denied, 423 U.S. 1034 (1976).

161. Id. at 415.

162. Id. at 414.

163. See infra pp.52-53.

164. 516 F.2d at 415.

165. 455 F.Supp. 57 (E.D.N.Y. 1978).

166. Morris v. Brentwood Union Free School District, No. 75-8746 (N.Y. Sup. Ct. August 14, 1975), aff'd 52 App. Div. 2d 584, 383 N.Y.S. 2d 542 (1976).

167. Cintron, 455 F.Supp. at 58.

168. Id. at 64.

169. Id. at 63.

170. Id.

171. At the time of suit, in all of New York State, the Brentwood school district was second only to New York City in the number of Spanish speaking pupils. Teitelbaum & Heller, supra note 136, at 14.

172. 480 F.Supp. 14 (E.D.N.Y. 1978).

173. Id. at 21-22.

174. Id. at 23.

175. Id.

176. See infra pp.51-52.

177. The Bilingual Education Act, §703(a)(4)(A)(i), 20 U.S.C. §3223(a)(4)(A)(i).

178. Fishman, supra note 68, at 5-6.

179. Rios, 480 F.Supp. at 23.

180. C. Veltman, The Retention of Minority Languages in the United States 5 (1980).

181. Id.

182. Id. at 6.

183. Id. at 23.

184. Lau, 414 U.S. at 566.

185. Id.

186. 587 F.2d 1022, 1024-25 (9th Cir. 1978).

187. Id. at 1030.

188. 474 F.Supp. 149 (M.D. Fla. 1979).

189. See supra notes 154-159 and accompanying texts.

190. 451 F.Supp 1324 (E.D. Mich. 1978).

191. Id. at 1326.

192. Id. at 1330.

193. Id. at 1332.

194. Id.

195. Id. at 1326.

196. See supra notes 65-71 and accompanying text.

197. 522 F.Supp. 162 (D.Mont. 1981).

198. A.J. Wabaunsee, Addendum: Native American Viewpoint, Bilingual Education: Current Perspectives--Law 65-66 (1977).

199. Id. at 69.

200. 648 F.2d 989 (5th Cir. 1981).

201. See supra notes 103-108 and accompanying text.

202. See supra notes 113-114 and accompanying text.

203. See supra notes 115-24 and accompanying text.

204. Rios, 480 F.Supp 23. See supra notes 173-176 and accompanying texts.

205. Castaneda, 648 F.2d at 1011.

206. Id. at 1011-1012.

207. See supra notes 115-124 and accompanying texts.

208. 680 F.2d 356 (5th Cir. 1981), rev'g 506 F.Supp. 405 (E.D. Texas 1981).

209. Id. at 372.

210. Id.

211. Id. at 372n.25

212. Id. at 372.

213. Id. at 371.

214. United States v. Texas, 523 F.Supp 703 (E.D. Tex. 1981) denying stay pending appeal of 506 F. Supp. 405.

215. See Morales v. Shannon, 516 F.2d 411; see supra notes 160-162 and accompanying text.

216. United States v. Texas, 523 F.Supp. at 737.

217. See United States v. Texas, 680 F.2d 356, 372; Morales v. Shannon, 516 F.2d 411, 414-15.

218. United States v. Texas, 523 F.Supp. at 737-38.

219. Eighteen states have passed legislation permitting the implementation of bilingual programs; eleven have passed statutes mandating bilingual education for students with limited English speaking ability.

220. In 1980, $107 million was spent for 575 projects reaching approximately 315,000 students. See Pifer, supra note 63, at 4.

221. See e.g. Serna, 409 F.2d 1147; Aspira, 72 Civ. 4002 (S.D.N.Y. August 29, 1974); Cintron, 45 F.Supp. 57; Rios, 480 F.Supp. 14; but see Morales v. Shannon, 516 F.2d 411.

222. See e.g. Guadalupe, 587 F.2d 1022, Castaneda, 648 F.2d 989.

223. Lau v. Nichols, 414 U.S. at 565.

224. Equal Educational Opportunity Act of 1974, 20 U.S.C. §1703(f).

225. Lau, 414 U.S. at 565-66.